

# **WEBINAR WEDNESDAYS**



**Wednesday, February 17, 2021**

## **HISTORY OF THE VICTIMS' RIGHTS MOVEMENT**

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Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

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## History of Victims' Rights

Colleen Clase  
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## Test Your Knowledge

Poll Question # 1

In early colonial (pre revolution) America, criminal offenses were predominantly prosecuted by:

- A. The British Navy
- B. Alexander Hamilton and Aaron Burr
- C. Private individuals victimized by the offender
- D. The First Continental Congress

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## The answer is...

C. Private individuals victimized by the offender

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## Historical Background- Colonial America

Victims were at the center of enforcing criminal law.

After a crime occurred, the burden of conducting the investigation generally fell on the victim.

After identification and arrest, it was up to the victim to prosecute the offender.

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## Historical Background- Colonial America

- Upon conviction, victims were awarded multiple types of damages.
- The damage award allowed victims to sell indigent offenders into service.
- If an offender could not be sold into service, they generally went free unless the victim could afford to pay the government to keep the offender in custody.

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## Historical Background- Colonial America

Why were private prosecutions acceptable?

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## Historical Background- Colonial America

Colonists feared tyranny

Cost effective for colonists



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## Historical Background- Colonial America

- Scholarly writings differ on the timing of when public prosecutors emerged as the predominant method of prosecution.
- Private prosecution was a core tenet of American criminal justice for much longer than many legal theorists realize, and it certainly remained prolific at the time of the framing of the Constitution.
- Early Americans, from the colonial period through at least the middle of the nineteenth century utilized a hybrid system of criminal prosecution. The frequency of public prosecution gradually increased from the early-eighteenth century to the mid-nineteenth century.

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## Historical Background- Colonial America

What was the driving force behind the change from private to public prosecutions?

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### Historical Background: 18th-19th Century

- As the commercial revolution progressed, society moved away from private prosecutions.
- The population became more mobile in response to commercial needs; thus, victims were no longer able to rely on fellow neighbors to help apprehend offenders.
- Reform of police, prosecutorial, and correctional systems were greatly influenced by Enlightenment writers.

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### Historical Background: 18th-19th Century

- The most influential essay of the time was Cesare Beccaria's *Essay on Crime and Punishment*.
- Beccaria viewed society as being created by a social contract and the criminal justice system was a way to obtain protections against offenders who chose to break the contract.
- Beccaria was critical of the use of the criminal justice system to aid in a private action to obtain redress from the offender.
- A system arising out of a social contract should serve the interests of society rather than the individual victim.
- Beccaria's writing distinguished between civil and criminal systems.

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### Historical Background: 19th Century

The role of the victim from the 19th Century to the 1970's is difficult to trace, but we know that victims went from being the at the center of a prosecution to informant and witness.

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## Test Your Knowledge

Poll Question # 2

From 1800 to the mid-1970's victims' rights were:

- A. Non-existent
- B. Protected by comprehensive statutory rights in every state
- C. Protected by the federal Constitution
- D. Based on a document drafted by Thomas Jefferson

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## The answer is...

A. Non-existent

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## What was expected of victims during this time?



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## Modern Victims' Rights Movement: 1970's

- The legal impetus for the Modern Crime Victims' Rights Movement was, in part, the 1973 United States Supreme Court decision in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1972).
- In *Linda R.S.*, the Supreme Court considered whether an unmarried woman could seek to enjoin the prosecutors' office from discriminatorily applying a statute criminalizing the non-payment of child support by refusing to prosecute fathers of children born to unmarried women.
- The Court's narrow holding was that the victim could not demonstrate a nexus between the prosecutor's alleged discriminatory enforcement of the child support statute and the woman's failure to secure child support payments; the victim did not have standing to seek the relief she requested.
- The Court acknowledged the then-prevailing view that a crime victim cannot compel a criminal prosecution as private citizens lack a judicially cognizable interest in a prosecution of criminal offenses.
- The Court went on to provide a foundation for remedying the above-described situation when it stated that Congress could "enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."

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## What did victims fight for?

The right to notice and to be present



The right to be heard



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## Test Your Knowledge

Poll Question # 3

In the 1980's, a task force on crime victims was formed as a result of:

- A. Congress voting and passing a bill to include a victims' rights amendment to the federal Constitution
- B. The 40th President of the United States signing an Executive Order
- C. After a United Supreme Courts opinion holding that victims have a right to counsel
- D. There was not a task force on victims of crime

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The answer is...

B. The 40th President of the United States signing an Executive Order

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Victims' Rights:  
1980's



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The  
President's  
Task Force on  
Victims of  
Crime

- On April 23, 1982, President Reagan issued Executive Order 12360 that: (1) called for a Task Force on Victims of Crime that would conduct a review of national, state, and local policies and programs affecting victims of crime; (2) requested the Task Force to work with the Cabinet Council on Legal Policy; and (3) requested the Task Force to advise the President and the Attorney General with respect to actions, which can be undertaken to improve efforts to assist and protect victims of crime.
- View Executive Order 12360: <https://www.reaganlibrary.gov/archives/speech/executive-order-12360-presidents-task-force-victims-crime>

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## Test Your Knowledge

Poll Question # 4

The President's Task Force resulted in \_\_\_\_\_ recommendations

- A. 13
- B. 26
- C. 57
- D. 68

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## The answer is...

D. 68

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## A Few of the Recommendations

- Laws be passed at both state and federal levels "that protect all citizens and that recognize society's interest in assisting the innocent to recover from victimization."
- Congress should enact legislation to provide federal funding to assist in the operation of federal, state, local, and private non-profit victim assistance agencies that make comprehensive assistance available to all victims of crime.
- The task force also proposed a federal constitutional amendment to protect victims of crime.
- View the full report: <https://www.ojp.gov/pdffiles1/ovc/87299.pdf>

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### Implementation of Recommendations

- The Office for Victims of Crime (OVC) was created by U.S. Department of Justice to implement recommendations.
- The Victims of Crime Act (VOCA) is passed & establishes the Crime Victims Fund from federal criminal fines & penalties to support state victim compensation & service programs.
- States begin to establish victims' compensation programs and pass constitutional amendments.

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### Victims' Rights: ARIZONA

Many states, including Arizona, began to amend their constitutions and/or enact statutes to address the poor treatment of victims by providing rights that would guarantee an opportunity for meaningful participation during the criminal justice process.



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### State v. Ault, 150 Ariz. 459 (Ariz. 1986).

- Michael Ault unlawfully enters a home the night after Christmas and molests a six-year-old girl.
- Ault left large muddy footprints on the floor of the bedroom of his child-victim. The child-victim identified Ault in photographic lineup and described what he had been wearing.
- Officers located Ault early the next morning at his residence. Ault eventually agreed to go with officers to be questioned, but he wanted to change clothes first. Over Ault's objections, officers accompanied him inside of his home because they were concerned that he may have a weapon.
- Once inside the home, officers noticed Ault's muddy boots and clothes that the six-year-old victim described.

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### State v. Ault, 150 Ariz. 459 (Ariz. 1986).

- Ault eventually arrested and convicted.
- On appeal, The Arizona Supreme Court invokes the exclusionary rule to reverse Ault's convictions for second degree burglary and molestation of a six-year-old child.
- The exclusionary rule was first developed by the United States Supreme Court decades before *Ault* to deter police misconduct.
- Arizona's Supreme Court departed from U.S. Supreme Court precedent, representing a bold new application of the rule and finding a broader right to privacy than already existed in Arizona's constitution.

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### State v. Ault, 150 Ariz. 459 (Ariz. 1986).

- The Court's ruling drew criticism.
- Steve Twist, then Chief Assistant Attorney General, wrote an article that appeared in the Arizona Republic on January 11, 1987 calling for reform of Arizona's constitution to preserve rights for victims.
- The *Ault* majority found the exclusionary rule grounded in Arizona's state constitutional right to privacy that "No person should be disturbed in his private offices, or his home invaded, without authority of the law."
- The *Ault* majority characterized the police entry into the defendant's home as unlawful. One can't help but wonder how the parents of the six-year-old victim felt as the defendant had unlawfully entered their home prior to molesting their daughter.

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### Arizona's Victims' Rights Movement

"We have it within our power to shape the kind of system that we want. We need not resign ourselves to the inevitability of forces beyond our control. If there is one legacy from the progressive, populist constitution that the state's founders have left us, it is that we have the power in our hands to change our constitution when it no longer serves the ends of justice. But we can do it only if we have the will."

- Steve Twist, January 11, 1987

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## Arizona's Victims' Rights Movement

- With Ault and the criticism it received, Arizona's victims' rights movement was born.
- Steve Twist was the primary author of the proposed Victims' Bill of Rights. Steve gave a speech to APAAC in the late 1980's.
- Arizona's victims' rights movement, led by the Victims' Bill of Rights Task Force, crime victims, prosecutors, and other organizations, was truly grassroots.
- There had been two unsuccessful attempts to get a victims' rights amendment referred by the Arizona Legislature.
- Strong opposition came from defense attorneys and, astonishingly, judicial officers.

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## Arizona's Victims' Rights Movement

- In 1989, Steve Twist wrote an article for the Arizona Republic in response to a letter to the editor by a Mesa attorney who believed that victims already had enough protections and that a Victims' Bill of Rights would take away from the rights of the accused.
- This article gave the people of Arizona the truth about the proposed victims' bill of rights.
- The people of Arizona rallied to support a 1990 ballot initiative.
- Petitions were circulated and signed by thousands of Arizonans, who saw and disapproved of the grave injustices in how victims were treated during the criminal justice process.

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## Arizona's Victims' Rights Movement

- On November 6, 1990, Arizonans voted overwhelmingly to add the new Victims' Bill of Rights to Arizona's constitution.
- In 1991, implementing statutes were enacted to define, preserve and protect victims' constitutional rights.

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## Arizona's Victims' Bill of Rights

Section 2.1. (A) To preserve and protect victims' rights to justice and due process, a victim of crime has a right:

1. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.
2. To be informed, upon request, when the accused or convicted person is released from custody or has escaped.
3. To be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.
4. To be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing.
5. To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant.
6. To confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition.
7. To read pre-sentence reports relating to the crime against the victim when they are available to the defendant.
8. To receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury.
9. To be heard at any proceeding when any post-conviction release from confinement is being considered.
10. To a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.
11. To have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights.
12. To be informed of victims' constitutional rights.

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## Arizona's Victims' Rights Movement

- Beyond providing constitutional rights to victims on paper, Steve Twist and Sen. Jon Kyl had a vision for providing victims a way to enforce their constitutional rights and assure that their voices would be heard during the criminal justice process.
- In 1996, the future of non-profit victim services was shaped when they founded Arizona Voice for Crime Victims (AVCV), the very first clinic of its kind to provide both legal and social services to crime victims at no cost.
- AVCV was a model clinic for Arizona and the country.

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## Arizona's Victims' Rights Movement

- In the 30 years since Arizona's Victims Bill of Rights, our Court of Appeals and Supreme Court have decided important victims' rights issues.

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## Test Your Knowledge

Poll Question # 5

In Arizona, victims include

- A. Parents of a homicide victim
- B. Children of a homicide victim
- C. Siblings of a homicide victim
- D. All of the above

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## The answer is...

D. All of the above

*E.H. v. Slayton*, 245 Ariz. 331 (App. 2018).

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## *E.H. v. Slayton*, 245 Ariz. 331 (App. 2018).

- Four defendants charged in connection with the abuse and murder of a six-year-old boy.
- One of the defendants enters into a guilty plea.
- The sibling of the victim did not have an opportunity to confer with the prosecution about the plea.
- Victim's counsel seeks a reexamination hearing.
- DCA's and defense counsel assert that the sibling isn't the victim, someone from victim services has already been appointed as the victim representative for the deceased six-year-old.
- Trial court finds that sibling is not a victim; thus, no constitutional right to confer.

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***E.H. v. Slayton, 245 Ariz. 331 (App. 2018).***

- Victim's counsel files a Petition for Special Action.
- Oral argument held in June 2018.
- Shortly after oral argument, trial court announces that the sibling of the six-year-old murder victim will not be permitted into the courtroom during trial of another defendant until after she testifies noting that the Court of Appeals has not yet overruled him.
- Victim's counsel asks for a stay of all proceedings against all defendants until the Court of Appeals issues a decision; trial court denies stay.

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***E.H. v. Slayton, 245 Ariz. 331 (App. 2018).***

- Victim's counsel seeks a stay from the Court of Appeals.
- The Court of Appeals does not issue a stay. It does, however, issue an order accepting jurisdiction over the victim's Petition for Special Action and grants relief.

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***E.H. v. Slayton, 245 Ariz. 331 (App. 2018).***

"IT IS ORDERED accepting jurisdiction and granting relief on E.H.'s claim that she is a victim as defined by A.R.S. § 13-4401 (19) and thus is entitled to the rights guaranteed under Arizona's Victims' Bill of Rights. We hold that E.H. must be permitted to exercise victims' rights in any prospective proceedings involving the crime committed against J.H....  
A written decision will be issued in due course."

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***E.H. v. Slayton, 245 Ariz. 331 (App. 2018).***

The written decision:

"...anyone who fits within the enumerated categories of familial relations specified in A.R.S. § 13-4401(12) is a victim and thus entitled to the rights guaranteed under Arizona's Victims' Bill of Rights."

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**Test Your Knowledge**

Poll Question # 6

In Arizona, victims' counsel:

- A. May participate if they get approval from the state
- B. May participate if the defendant's counsel does not object
- C. Must be appointed by the court
- D. Has a presumptive right to be in the well of the courtroom when victims' rights are being asserted

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**The answer is...**

**D. Has a presumptive right to be in the well of the courtroom when victims' rights are being asserted**

*E.H. v. Slayton, 249 Ariz. 248 (Ariz. 2020).*

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***E.H. v. Slayton, 249 Ariz. 248 (Ariz. 2020).***

- After the issues in the E.H. v. Slayton case were resolved and the victim had an opportunity to confer, plea agreements were extended to the remaining defendants.
- Restitution was capped over the victim's objection based on pre-Victims' Bill of Rights case authority analyzed under the federal due process clause.
- At sentencing, the trial court went off the record and asked counsel for the victim to leave the well of the courtroom. She was instructed to sit in the gallery and that he would call her to the podium when he was ready for her to make the record about the restitution caps.
- Victim's counsel filed another Petition for Special Action.

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***E.H. v. Slayton, 249 Ariz. 248 (Ariz. 2020).***

- Arizona Court of Appeals holds oral argument; declines to accept jurisdiction.
- Victim's counsel files a Petition for Review, asks the Arizona Supreme Court to overrule its pre-Victims' Bill of Rights cases requiring restitution caps and to hold that victims' have a right to have their private counsel in the well of the courtroom.
- Oral argument held.

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***E.H. v. Slayton, 249 Ariz. 248 (Ariz. 2020).***

On August 4, 2020, the Arizona Supreme Court issued an opinion holding:

1. "The practice of placing a cap on the amount of restitution a defendant may be liable for in a plea agreement, without the victims' consent, violates the right to restitution. There is no constitutional requirement to inform a defendant of a specific amount of restitution or to cap the amount of restitution that a court may order..."
2. "...a lawyer representing a victim has a presumptive right sit in front of the bar in the courtroom during a proceeding where a victim's constitutional or statutory rights are at issue."

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## Test Your Knowledge

### Poll Question # 7

In Arizona, the parent of a minor victim, who is asserting rights on behalf of the minor victim, may refuse a defense interview until:

- A. The case ends
- B. The minor victim reaches the age of majority
- C. The defendant objects to the refusal to submit to a defense interview
- D. The state objects to the refusal to submit to a defense interview

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## The answer is...

A. The case ends

J.D.; *MM v. Hegyi*, 236 Ariz. 39 (Ariz. 2014).

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## J.D.; *MM v. Hegyi*, 236 Ariz. 39 (Ariz. 2014).

- Victim disclosed sexual abuse at the hands of her step-father.
- Step-father indicted in 2011; victim's mother asserts rights on behalf of minor victim.
- Mother also asserts her own right to refuse a defense interview.
- Multiple continuances made by defense for various reasons, minor victim turns 18.
- After minor victim turned 18, Defense counsel requests an interview of victim's mother.
- Victim and her mother object.
- Trial court sides with the defense; counsel for victim and her mother filed a Petition for Special Action.

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**J.D.; MM v. Hegyi, 236 Ariz. 39 (Ariz. 2014).**

- Court of Appeals (Div. 1) accepts jurisdiction, denies relief.
- Another panel of the Court of Appeals (Div. 1) decides a similar issue but reached a different conclusion.
- Counsel for the victim and her mother file a Petition for Review.
- Arizona Supreme Court considers the issue.

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**J.D.; MM v. Hegyi, 236 Ariz. 39 (Ariz. 2014).**

The Arizona Supreme Court held "that a parent who exercises victims' rights on behalf of a minor child is entitled to refuse a defense interview through the final disposition of the charges, even if the child earlier turns eighteen."

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**Arizona's Movement Continues**

- AVCV has a rule change petition, supported by APAAC, pending in the Arizona Supreme Court seeking to fully integrate victims' rights throughout the Arizona Rules of Criminal Procedure.
- Purpose of integration is for ease of practice for attorneys, judges, and other criminal justice professionals.
- Victims' rights are already partially integrated into some of the Arizona Rules of Criminal Procedure; full integration will allow for consistency.

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## The Federal Crime Victims' Rights Act

- After getting Arizona on its way, Steve has worked tirelessly toward a federal constitutional amendment that will someday provide federal constitutional rights and protections to victims of crimes. In working towards that goal, Steve was instrumental in helping to secure passage of the federal Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, in 2004.
- Steve worked closely with the two lead sponsors of the legislation, Senator Kyl and Senator Feinstein (California). When it became clear that the federal constitutional amendment was not going to pass through Congress in 2004, Steve approached Senators Kyl and Feinstein about passing "model" federal legislation protecting victims, which became the CVRA. Since the enactment of the CVRA, it has helped to protect victims through the federal system and provided state-of-the-art language for other states interested in protecting victims' rights through statute.
- After the passage of the CVRA, Steve, along with Keli Luther, took the first federal case under the CVRA to the Ninth Circuit Court of Appeals.

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## Kenna v. U.S. Dist. Court for C.D. Cal., 435 F.3d 1011 (9th Cir. 2006)

- Two defendants pled guilty to two counts of wire fraud and one count of money laundering; more than 60 victims.
- Victim, Kenna, made a victim impact statement at sentencing for the first defendant.
- Three months later, at sentencing for the second defendant, the District Court Judge noted that he had previously heard from the victims at the co-defendant's sentencing and refused to let them speak.
- Victim's counsel filed a Writ of Mandamus with the Ninth Circuit Court of Appeals.

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## Kenna v. U.S. Dist. Court for C.D. Cal., 435 F.3d 1011 (9th Cir. 2006)

The Kenna Court noted that the "criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard. The Crime Victims' Rights Act sought to change this by making victims independent participants in the criminal justice process." The court held that "the district court erred in refusing to allow Kenna and other victims to speak."

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## Arizona's Movement is Still Happening

- Arizona's Victims' Right Movement is still happening.
- It takes all of us, prosecutors and victims' rights attorneys, to have the courage to identify and litigate victims' rights issues, to seek statutory amendments to ensure our laws do not violate the Victims' Bill of Rights, and to take steps to modernize our rules of procedure.

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- Office on Victims of Crime [https://www.ojp.gov/ovc\\_archives/ncvriw/2005/pg4d.html](https://www.ojp.gov/ovc_archives/ncvriw/2005/pg4d.html): <https://www.ojp.gov/pdffiles/ovc/0229.pdf>
- The words of Lin-Manuel Miranda as expressed in Hamilton An American Musical

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## Contact AVCV

Web	Fill out a request for technical assistance at <a href="https://voiceforvictims.org">voiceforvictims.org</a>
Call	Call us at 480-600-2661
Email	E-mail <a href="mailto:cclose@voiceforvictims.org">cclose@voiceforvictims.org</a>

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